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RES ADJUDICATA IN HABEAS CORPUS PROCEEDINGS FOR CUSTODY OF CHILDREN.—Originally, the only purpose of *habeas corpus* was to enable the courts to examine the legality of restraints upon freedom and to liberate those who were imprisoned without cause, and the disposition of the common law courts to protect personal liberty is crystallized in the rule that a judgment on *habeas corpus* is no bar to subsequent applications for the writ.¹ But to-day, there are many modifications of the common law conception of the writ.² This is illustrated by extensions in the use of *habeas corpus* in cases involving the custody of children.

The jurisdiction of the courts in this field has two aspects. On the one hand, the inherent power of both law and equity courts to relieve by *habeas corpus* from unlawful imprisonment is exercised to free the infant from improper restraints.³ But under this power, the only effect of the court's mandate is to give the infant, provided it has reached the age of discretion, freedom of volition to pursue its own desires.⁴ In order, therefore, to fix the custody or guardianship of the child the jurisdiction of the court must be found in an entirely different theory, namely, the power of Chancery to exercise the prerogatives of the Crown as *parens patriae*.⁵ In this regard the Chancellor had the exclusive supervision over infants, and in every decree looked to the interest and welfare of his wards.⁶

Habeas corpus provided a very convenient method for determining the rights of private parties to the custody of infants, for whether the court was asked merely to remove an unlawful restraint, or to exercise its general powers of supervision, the cause ultimately involved the right of custody.⁷ Obviously, when the real question at issue is the determination of the legal rights of the contesting parties, the object of the proceeding is not to protect the personal liberty of the infant, and consequently, many of the usual attributes of *habeas*

¹2 Spelling, Extraordinary Remedies (2nd ed.) § 1197.

²In general, a judgment on *habeas corpus* is not subject to review or appeal. See *Bell v. State* (Md. 1846) 4 Gill. 301. However, statutes as well as judicial revision in many states have made a judgment on *habeas corpus* conclusive, and therefore reviewable. 1 Bailey, *Habeas Corpus*, §§ 59, 61; *Hurd, Habeas Corpus*, 566, 568.

³See *Rex v. Delaval* (1763) 3 Burr. 1434; *Matter of Wollstonecraft* (N. Y. 1819) 4 Johns. Ch. 79; *State v. Baird* (1868) 19 N. J. Eq. 481.

⁴The decree generally provided for releasing the infant from all improper restraint. *Rex v. Delaval*, *supra*; *Matter of M'Dowle* (N. Y. 1811) 8 Johns. 328. Of course, when the infant was of tender years the court always made an adequate provision for its disposition. See *State v. Stigall* (1849) 22 N. J. L. 286.

⁵*Reeves, Husband and Wife* (4th ed.) 392; *DeManneville v. DeManneville* (1804) 10 Ves. 52; *Wellesley v. Duke* (1827) 2 Russ. 3.

⁶Although both in law and equity it is usually conceded that the father has the paramount right to the custody, *King v. DeManneville* (1804) 5 East 221, the controlling consideration is the welfare of the child. See *Foster v. Alston* (Miss. 1842) 6 How. 406; *State v. Baird* (1867) 18 N. J. Eq. 194; *Green v. Campbell* (1891) 35 W. Va. 698. And the court will not be bound by a foreign decree if it is against the best interests of the child. See 13 *Columbia Law Rev.* 553; *Jones v. Bowman* (1904) 13 Wyo. 79.

⁷See 2 *Fiero, Special Proceedings* (3rd ed.) 1237; *Simpson, Infants* (2nd ed.) 109.

corpus are inapplicable.⁸ Accordingly, so long as the circumstances are not substantially changed the doctrine of *res adjudicata* should bar any succeeding applications by the same parties, just as in ordinary cases of civil controversy.⁹ That this result serves the best interests of the infant is shown in the cases of *Knapp v. Tolan*¹⁰ (N. D. 1913) 142 N. W. 915, and *In re Breck* (Mo. 1913) 158 S. W. 843. Here, the courts recognize that a failure to apply the doctrine of *res adjudicata* to the cases where the parties seek, by the writ of *habeas corpus*, to determine their private rights to custody will prejudice the interests of the infant, since the effect would be to hail the infant constantly into the court in obedience to the whims of persistent litigants.

The difficulty that confronts the application of the doctrine is the fact that although the case assumes the form of a contest to adjust the rights of private parties to custody, the interests of the child are inseparably associated with the determination of these rights.¹¹ Consequently some courts have been led into confusion by failure to distinguish the effect of the judgment upon the rights of the infant, and upon the rights of the particular contestants.¹²

The paramount consideration, however, in these cases is the welfare of the infant. Therefore, the status of the infant being ambulatory, since what is for its best interest varies from time to time, the court ought always be free to exercise its discretion to modify or annul any previous order on behalf of the infant¹³ whenever changes in the conditions should require. This, moreover, is not inconsistent with the general principles of *res adjudicata*, inasmuch as under no circumstances should a decree take effect as a determination of rights that did not exist at the time it was made.

⁸See *State v. Bechdel* (1887) 37 Minn. 360; *Slack v. Perrine* (1896) 9 App. Cas. (D. C.) 128; *Cormack v. Marshall* (1904) 211 Ill. 519. For a brief historical discussion of the writ see note to *In re Burrus* (1890) 136 U. S. 586, 597.

⁹2 Spelling, Extraordinary Remedies (2nd ed.) § 1198; *In re Sneden* (1895) 105 Mich. 61; *Dawson v. Dawson* (1905) 57 W. Va. 520; *In re Clifford* (1905) 37 Wash. 460.

¹⁰For a discussion of this case see New York Law Journal, Oct. 1, 1913.

¹¹2 Fiero, Special Proceedings (3rd ed.) 1237; Wood, *Habeas Corpus*, 134; see *State v. Baird* (1867) 18 N. J. Eq. 194.

¹²The state of the law in Kansas in this particular is noteworthy. *In re Hamilton* (1903) 66 Kan. 754, decided March 7, 1913, holds that where the real issue is between private parties, and no question of personal liberty arises, *res adjudicata* applies. In *In re King* (1903) 66 Kan. 695, the opinion of which was filed April 11, the court decides that estoppel under the doctrine of *res adjudicata* cannot be invoked to preclude the court from making an order for the best interests of the child. Later in the case of *Bleakley v. Barclay* (1907) 75 Kan. 462, the court attempts to reconcile the former decisions, apparently without acknowledging the real distinction. The cases are readily distinguishable, on the ground that in the Hamilton case the court stated the true rule in regard to the relative rights of the parties themselves, while in the King case the court deals with the case from the viewpoint of the infant, and *res adjudicata* is not applicable. See *Cormack v. Marshall*, *supra*, where the court indicates this distinction in a reference to the Kansas decisions.

¹³See *State v. Bechdel*, *supra*; *In re Sneden*, *supra*; *Slack v. Perrine*, *supra*; *McGough v. McGough* (1902) 136 Ala. 170; *Cormack v. Marshall*, *supra*; *In re Clifford*, *supra*.